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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**
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11 MAX REED, II,) 3:11-cv-00066-HDM-WGC
12)
13 Plaintiff,)
14 vs.) ORDER
15)
16 DEPUTY TRACY, et al.,)
17)
18 Defendants.)
19 _____)

20 The court has considered the report and recommendation of the
21 United States Magistrate Judge (#83) filed on July 10, 2013, in
22 which the magistrate judge recommends that this court enter an
23 order granting in part and denying in part the defendants' motion
24 for summary judgment (#70). Defendants have filed an objection to
25 the report and recommendation (#88). There was no response to the
26 objection. The court has considered the pleadings and memoranda of
27 the parties and other relevant matters of record and has made a
28 review and determination in accordance with the requirements of 28
U.S.C. § 636 and applicable case law, and good cause appearing, the
court hereby adopts and accepts in part and declines to adopt in

1 part the report and recommendation of the United States Magistrate
2 Judge (#84).

3 The court hereby adopts and accepts the magistrate judge's
4 recommendation that summary judgment should be granted to defendant
5 Haley on the claim in Count I that the plaintiff was denied access
6 to courts in connection with the instant civil rights action and
7 with his petitions for writ of habeas corpus.

8 The court declines to adopt the magistrate judge's
9 recommendation that summary judgment be denied to defendant Haley
10 on the claim in Count I that the plaintiff was denied access to
11 courts while preparing a defense for his criminal case, CR10-1575.
12 The magistrate judge states that "[d]efendant Haley does not raise
13 . . . an argument that Plaintiff has not established actual injury
14 with respect to his criminal action. Nor does defendant Haley
15 raise the defense of qualified immunity." (Report & Rec. at 12).
16 The magistrate judge notes that because these two issues are not
17 raised by the defendants, the court will not consider or address
18 them.

19 Qualified immunity is recognized as an affirmative defense
20 that must be pled by the defendant. *See, e.g., Siegert v. Gilley*,
21 500 U.S. 226, 231 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 815
22 (1982); *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993).
23 The defendant's motion for summary judgment does not raise the
24 defense of qualified immunity at all. The court agrees with the
25 magistrate judge's conclusion that qualified immunity cannot be
26 considered as a defense unless affirmatively and properly raised by
27 the defendants, and so cannot be considered here.

1 However, actual injury is a required element of any access to
2 courts claim. See *Lewis v. Casey*, 518 U.S. 343, 349; *Madrid v.*
3 *Gomez*, 190 F.3d 990, 996 (9th Cir. 1990). While the defendants do
4 not raise the issue of actual injury in the labeled section of
5 their motion for summary judgment discussing the access to courts
6 claim as it pertains to the plaintiff's defense in his criminal
7 case (see Def. Mot. Summ. J at 10-13), defendants do raise the
8 issue in the labeled sections of their motion discussing the access
9 to courts claim as it pertains to the instant civil rights case
10 (see *id.* at 13-14) and the plaintiff's filing of petitions for writ
11 of habeas corpus (see *id.* at 14). Moreover, the defendants'
12 discussion makes clear that the requirement that prisoners show
13 actual injury applies to all access to courts claims, irrespective
14 of whether those claims arise in the context of civil or criminal
15 matters. (See *id.*).

16 Of course, as the party seeking summary judgment, the
17 defendants "bear the initial responsibility of informing the
18 district court of the basis for its motion, and identifying those
19 portions of the pleadings, depositions, answers to interrogatories,
20 and admissions on file, together with the affidavits, if any, which
21 it believes demonstrate the absence of a genuine issue of material
22 fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)
23 (quotation marks omitted). While the defendants should have been
24 more clear that the actual injury requirement applies to and is an
25 issue with regard to plaintiff Reed's claim of denial of access to
26 courts while preparing his criminal defense, the defendants do
27 still raise the requirement and point out that plaintiff Reed has
28 failed to meet the burden of showing injury with regard to various

1 claims. In doing so, the defendants have made a “‘showing’-that
2 is, point[ed] out to the district court-that there is an absence of
3 evidence to support the nonmoving party’s case” with regard to the
4 actual injury requirement. *Id.* at 325. Because the defendants
5 have satisfied this initial burden, the burden shifts to the
6 opposing party to “set forth specific facts showing that there is a
7 genuine issue for trial.” *Matsushita Elec. Indus Co. v. Zenith*
8 *Radio Corp.*, 475 U.S. 574, 586 n.11 (quoting Fed. R. Civ. P.
9 56(e)).

10 Plaintiff Reed has not met his burden of showing a genuine
11 issue for trial with regard to his access to courts claim as it
12 pertains to his criminal defense, because he has not shown actual
13 injury. In his complaint (#4) and in his opposition to the
14 defendants’ motion for summary judgment (#74), he makes a litany of
15 allegations regarding his alleged denial of the right to access
16 courts. He states, for example, that appointed standby counsel
17 “provide[d] no assistance whatsoever” (Pls. Opp’n. Def. Mot. Summ.
18 J. at 6), that Washoe County correctional staff “obstructed his
19 ability to obtain adequate assistance from other inmates” (*id.* at
20 6), that he was not given enough time to review media discovery
21 (*id.* at 7), and that Washoe County correctional staff “continuously
22 thwarted all of [his] attempts for the necessary access to ‘law
23 books’ [sic] and or [sic] court procedure” (Compl. at 4). However,
24 to meet the actual injury requirement, plaintiff Reed must show
25 “actual prejudice with respect to contemplated or existing
26 litigation, such as an inability to meet a filing deadline or to
27 present an actual claim.” *Lewis*, 518 U.S. at 348 (citation
28 omitted). In fact, “‘failure to show that a non-frivolous legal

1 claim has been frustrated' is fatal to a [denial of access to
2 courts] claim." *Alvarez v. Hill*, 518 F.3d 1152, 1155 n.1 (9th Cir.
3 2008) (quoting *Lewis*, 518 U.S. at 353 n.4).

4 Nowhere in the record does plaintiff Reed allege an actual,
5 specific injury with respect to his criminal defense. He has
6 presented no evidence that the outcome of his case, CR10-1575, was
7 affected in any way by his alleged denial of access, and no
8 evidence that any specific legal claim was frustrated by any of the
9 defendants. Even viewing the evidence, as required, "'in the light
10 most favorable to the party opposing the motion,'" plaintiff Reed
11 has failed to show that there is a genuine issue of material fact
12 with regard to whether he suffered actual injury as a result of
13 being denied access to courts while preparing his criminal defense.
14 *Matsushita*, 475 U.S. at 574 (quoting *United States v. Diebold*, 369
15 U.S. 654, 655 (1962)).

16 As discussed above, actual injury is an essential element of
17 any access to courts claim; it relates to the plaintiff's standing
18 to assert the claim, and is a jurisdictional requirement that may
19 not be waived. See *Lewis*, 518 U.S. at 349 n.1. Because plaintiff
20 Reed has "fail[ed] to make a showing sufficient to establish the
21 existence of an element essential to [his] case, and on which [he]
22 will bear the burden of proof at trial," Fed. R. Civ. P. 56(c)
23 requires the entry of summary judgment. *Celotex*, 477 U.S. at 322.
24 There is no genuine issue of material fact, "since a complete
25 failure of proof concerning an essential element of the nonmoving
26 party's case necessarily renders all other facts immaterial." *Id.*
27 at 323. Accordingly, the court hereby grants summary judgment to
28 defendant Haley on the access to courts claim in Count I insofar as

1 it is predicated on the plaintiff suffering actual injury in
2 connection with the defense of his criminal action.

3 The court also declines to adopt the magistrate judge's
4 recommendation that summary judgment should be wholly denied to
5 defendants Tracy, Jenkins and Hamilton on the retaliation claim in
6 Count II. The defendants argue that plaintiff Reed's retaliation
7 claims are barred by *Heck v. Humprey*, 512 U.S. 411 (1983). (Def.
8 Mot. Summ. J. at 16-18). The defendants note that, due to a weapon
9 being found in the plaintiff's cell during the allegedly
10 retaliatory search, the plaintiff was charged in CR11-0026 with the
11 crime of possession of a dangerous weapon by a prisoner, a
12 violation of NRS 212.185. (*Id.* at 17). Plaintiff Reed was then
13 convicted under that statute by a jury, and his conviction was
14 later affirmed by the Supreme Court of Nevada. *Id.*; see also Def.
15 Mot. Summ. J. Ex. 8 (order granting judgment on verdict in CR11-
16 0026); Def. Mot. Summ. J. Ex. 15 (Nevada Supreme Court order of
17 affirmance affirming plaintiff Reed's conviction in CR11-0026).
18 The Defendants argue that "allow[ing] Reed's retaliation claim in
19 Count 2 to proceed" would be in violation of *Heck* because it "would
20 necessarily raise a question as to the validity of [the
21 plaintiff's] conviction of possession of a dangerous weapon by a
22 prisoner." (Def. Mot. Summ. J. at 18).

23 *Heck* holds that "when a state prisoner seeks damages in a 1983
24 suit, the district court must consider whether a judgment in favor
25 of the plaintiff would necessarily imply the invalidity of his
26 conviction or sentence." *Heck*, 512 U.S. at 487. Thus, "if a
27 criminal conviction arising out of the same facts stands and is
28 fundamentally inconsistent with the unlawful behavior for which

1 section 1983 damages are sought, the 1983 action must be
2 dismissed." *Smith v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996).
3 However, if the "action, even if successful, will *not* demonstrate
4 the invalidity of any outstanding criminal judgment against the
5 plaintiff, the action should be allowed to proceed, in the absence
6 of some other bar to the suit." *Id.* "In evaluating whether claims
7 are barred by *Heck*, an important touchstone is whether a § 1983
8 plaintiff could prevail only by negating 'an element of the offense
9 of which he has been convicted.'" *Cunningham v. Gates*, 312 F.3d
10 1148, 1153-54 (9th Cir. 2002) (quoting *Heck*, 512 U.S. at 487 n.6).

11 In determining whether plaintiff Reed's retaliation claim is
12 barred in part or in full by *Heck*, the necessary inquiry is
13 therefore whether a court can rule in the plaintiff's favor on his
14 claim "only by negating 'an element of the offense of which he has
15 been convicted.'" *Id.* Under NRS 212.185, the statute plaintiff
16 Reed was convicted under following the search, "[a] person who is
17 incarcerated in the state prison or any county or city jail or
18 detention facility or other correctional facility in this State . .
19 . and who possesses or has in his or her custody or control any" of
20 a number of listed weapons, but also any "other similar weapon,
21 instrument or device, is guilty of a category B felony." Based on
22 this language, the elements of this crime are that a person who is
23 (1) incarcerated (2) possesses or has in his or her custody or
24 control (3) a weapon. Importantly, Nevada case law has treated NRS
25 212.185 to also include knowledge as an element. *See, e.g., Fore*
26 *v. State*, 118 Nev. 330, 331 (Nev. 2002) ("According to the charges
27 in the information to which Fore ultimately pleaded guilty, he
28 knowingly was in possession and/or control of a piece of sharpened

1 wire approximately six inches in length. We conclude that based on
2 the plain language of the statute, Fore's possession of this
3 implement is punishable under Nevada law."); *Lewis v. State*, No.
4 50135, 2009 WL 1470414 at *2 (Nev. Mar. 4, 2009) ("We conclude that
5 a rational juror could infer from the testimony presented at trial
6 that Lewis had constructive possession and knowledge of the shank
7 that was found in his footlocker.").

8 There are four components to plaintiff Reed's retaliation
9 claim. The first component is that the search itself, which was
10 allegedly "order[ed]" by defendant Hamilton and conducted by
11 defendant Tracy, was retaliation for the plaintiff's grievance
12 filings. (See Compl. at 5). The second component is that
13 Defendants Haley and/or Hamilton planted a weapon in the
14 plaintiff's cell or claimed that the plaintiff had a weapon in his
15 cell when he did not, also as retaliation. (See Compl. at 5). The
16 third component is that defendant Jenkins found the plaintiff
17 guilty of weapon possession, also as retaliation. (See Compl. at
18 5.) The fourth component is that defendant Jenkins placed the
19 plaintiff in administrative segregation as retaliation following
20 the finding that plaintiff Reed was guilty of weapon possession.
21 (See Compl. at 6).

22 Given the elements of NRS 212.185, the court agrees that
23 judgment as to the first component of the plaintiff's retaliation
24 claim, that the search itself was an act of retaliation by
25 defendants Haley and/or Hamilton, is not barred by *Heck*. No
26 elements of the offense must be negated in order for the plaintiff
27 to succeed on this component. The court hereby denies summary
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1 judgment to defendants Haley and Hamilton as to this component of
2 the plaintiff's retaliation claim.

3 However, the court finds that judgment as to the second,
4 third, and fourth components of plaintiff Reed's retaliation claim
5 is barred by *Heck*, and so the court hereby grants the defendants
6 summary judgment as to these components of the plaintiff's
7 retaliation claim. As to the second component, the plaintiff could
8 only succeed on his claim that the weapon was planted or fabricated
9 by defendants Haley and/or Hamilton by showing that the plaintiff
10 was unaware of the weapon and did not himself place it in his cell,
11 but instead was "framed" by defendants Haley and/or Hamilton. This
12 showing would negate at least one of the elements of the offense,
13 the plaintiff's knowledge of the weapon. Similarly, for the
14 plaintiff to succeed on the third component, his claim that
15 Defendant Jenkins found him guilty of the offense as retaliation,
16 the plaintiff would have to show that defendant Jenkins found him
17 guilty not because he actually believed that plaintiff Reed
18 possessed the weapon, but rather to retaliate against plaintiff
19 Reed by "framing" him for weapon possession, knowing that plaintiff
20 Reed did not in fact possess the weapon. Again, this requires a
21 showing that the plaintiff had no knowledge of the weapon, which
22 negates an element of the offense. Finally, to succeed on the
23 fourth component, that defendant Jenkins placed the plaintiff in
24 administrative segregation as retaliation, Plaintiff Reed would
25 have to show that defendant Jenkins moved him into administrative
26 segregation for the purpose of retaliating against him, rather than
27 as a legitimate penological response to his weapon possession.
28 This once again requires a showing that defendant Jenkins was

1 involved in a scheme to "frame" the plaintiff, which again can only
2 be shown by negating the plaintiff's knowledge of the weapon, an
3 element of the offense.

4 In accordance with the foregoing, the defendants' motion for
5 summary judgment (#70) is hereby **GRANTED IN PART AND DENIED IN PART**
6 as follows:

7 (1) summary judgment is **GRANTED** to defendant Haley on the
8 access to courts claim in Count I in its entirety;

9 (2) summary judgment is **DENIED** to defendants Tracy and
10 Hamilton on the retaliation claim in Count II, insofar as it is
11 predicated on the plaintiff's claim that the actual search was a
12 retaliatory measure;

13 (3) summary judgment is **GRANTED** to defendants Haley and
14 Hamilton on the retaliation claim in Count II, insofar as it is
15 predicated on the plaintiff's claim that the weapon found during
16 the search was planted or fabricated by the defendants as a
17 retaliatory measure;

18 (4) summary judgment is **GRANTED** to defendant Jenkins on the
19 retaliation claim in Count II, insofar as it is predicated on the
20 plaintiff's claim that the defendant found the plaintiff guilty of
21 weapon possession as a retaliatory measure; and

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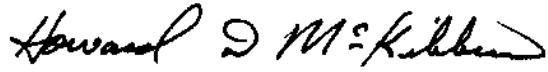
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1 (5) summary judgment is **GRANTED** to defendant Jenkins on the
2 retaliation claim in Count II, insofar as it is predicated on the
3 plaintiff's claim that the defendant moved the plaintiff into
4 administrative segregation as a retaliatory measure.

5 **IT IS SO ORDERED.**

6 DATED: This 13th day of September, 2013.

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9 UNITED STATES DISTRICT JUDGE
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